then came in contact with the radiator support bracket. When a force of 670 pounds was applied, the entire unit, the crossbar and vehicle, moved along the siderails (App. Vol. II, pp. 946-7).

In another test the crossbar was placed under the radiator bolt of the vehicle. The force necessary to move the vehicle off the crossbar was in the area of 1,800 to 2,000 pounds. (App. Vol. II, pp. 947-8). In another test the front bumper was placed squarely (not on the front edge) of the crossbar, and the forces required to move the vehicle off the crossbar was 770 pounds (App. Vol. II, p. 948). Dr. Manos further testified that in his expert opinion a man with a wrench could exert no more than approximately sixty (60) pounds pressure (App. Vol. II, p. 899). This evidence was uncontradicted.

Dr. Manos further testified in conclusion that when the crossbar was placed against the tires (as plaintiff testified) irrespective of the force applied the only movement resulting would be the sliding of the crossbar out to the radiator support bolt, but that the crossbar would not come out from under the vehicle "under any circumstances" (App. Vol. II, p. 1046). This, he testified, would be true even if all friction was removed between the crossbars and the siderails; that actually the friction between crossbar plates and the engaging flange of the siderail did not affect the security of the lift or the stability of the vehicle on the hoist, as demonstrated by his tests (App. Vol. II, pp. 1046-47). When the crossbar was under the radiator bolt it was "very secure" as it was when the bumper bolts were squarely on top of the lifting surface (App. Vol. II, p. 1047).

He testified unequivocally that the vehicle would never come off the lift with the front bar against the tires, whether it was fully raised or at a lower position; that the force exerted by a mechanic working on the vehicle in such a position would not be as much as one-tenth of of the force as he exerted on the vehicle in his attempt to force the vehicle off the crossbar in his tests (App. Vol. II, p. 1048).

Dr. Manos explained that, as designed, if any forces are applied to the vehicle while the vehicle is on the lift that the crossbar *and* vehicle will simply move along the siderails rather than off of the hoist (App. Vol. II, p. 1051).

Dr. Manos expressed the opinion as a consequence of all of his investigation and testing that at the time of the accident the front crossbar was under the very edge of the bumper in an obviously dangerous and precarious position (App. Vol. III, p. 294) (App. Vol. II, p. 1057).

All of this was because of the frictional forces involved. Frictional forces are, of course, natural, physical forces. The frictional force between the motor vehicle and the crossbar were simply many times greater than those between the crossbars and the siderails. Consequently, when forces were applied to the automobile it was simply caused to move safely along the siderails securely supported by the crossbars, *except* when the crossbar was improperly positioned under the curved *edge* of the bumper in an admittedly obvious and dangerous manner. Even then, the vehicle could be raised, but it could be forced from the hoist with minimal effort.

RESPONSE TO REASONS FOR GRANTING THIS WRIT.

1. The Decision Below Does Not Conflict With The Decisions Of Other Courts Of Appeals And Has Not Decided A Federal Question In Conflict With Applicable Decisions Of This Court.

The case of *Slocum* v. *New York L. Insurance Co.*, 228 U.S. 364 (1912), is inapplicable to the issue on the Petition for Writ of Certiorari and as admitted by Petitioner, this Court's decision in *Neely* v. *Eby*, 386 U.S. 317 (1967), clearly establishes the power of the Court of Appeals to direct an entry of judgment for this defendant. In the *Neely* case the Court discusses Rule 50 (b) and the trial court's right to enter a judgment notwithstanding the verdict. The Court states at pages 321 and 322:

> "The question here is whether the Court of Appeals, after reversing the denial of a defendant's Rule 50 (b) motion for judgment notwithstanding the verdict, may itself order dismissal or direct entry of judgment for defendant. As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment n.o.v. than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment n.o.v. See *Baltimore & Carolina Lines, Inc.* v. *Redman supra.* Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment n.o.v. on appeal".

Petitioner suggests that the "physical facts" rule can only be applied when the physical facts, scientific principles and laws of nature are undisputed and entirely inconsistent with and opposed to testimony necessary to make a case for the plaintiff. Respondents respectfully submit that such a standard accurately describes the facts and evidence of this case and the Seventh Circuit correctly applied that standard. (It is a "physical fact" that water won't run up-hill. This was demonstrated by all of the evidence. Plaintiff's testimony to the contrary was therefore incredulous and would not support the verdict.)

The cases cited by the petition from other jurisdictions are not in conflict with the opinion below but are clearly distinguishable.

The case of *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437 (1959), involved a factual dispute, where a jury could rationally conceive of a number of explanations for the accidental death. In response to this evidence, the respondent had evidence of "tests" which consisted of no more than the Sheriff testifying that after the death, he dropped the gun a number of times and that the trigger did not release on any of the occasions. This Court found error because despite these so called "tests", the petitioner had relevant evidence that an accidental discharge was possible and that with this evidence the jury could rationally conceive of a number of explanations of accidental death.

The reasoning of the *Dick* case is clearly not analogous to this case at bar. In this case, there was no evidence whatsoever that it was possible to cause the automobile to drop from the hoist when the crossbar was back

against the front tires. Even plaintiff's experts could never get the automobile to drop from the hoist under those circumstances. Unlike the *Dick* case, not only did the respondents (defendants) introduce evidence of numerous scientific tests, but the petitioners themselves introduced evidence of the same type of tests and their experts testified that they also could never get the automobile to drop from the hoist when the crossbar was back against the front tires. Moreover, none of petitioner's experts testified that in their opinion the accident happened while the crossbar was back against the front tires as testified to by the plaintiff, Zollman. In summary, all tests of all the experts clearly demonstrated that it was impossible because of the frictional forces and principles involved for the automobile to fall from the hoist in the way testified to by the plaintiff, Zollman, and that the only way the automobile could be caused to fall from the hoist was when the front crossbar was positioned under the very front edge of the bumper, *which admittedly involved a misuse of the hoist.*

In the case of *Travelers' Indemnity Co.* v. *Parkersburg Iron & S. Co.* (4th Cir. 1934), 70 F. 2d 63, the Court correctly held that the rule was not applicable because in that case the evidence of the experts for the plaintiff and the defendant as to how the accident happened were conflicting and the jury had the right to decide which experts they were going to believe and which expert testimony appeared to be consistent with the other testimony of the other witnesses. Again, this situation is not present in the case at bar and is clearly not analogous.

Again in *Born* v. *Osendorf* (8th Cir. 1964), 329 F. 2d 669, the Court correctly states the rule that a verdict

cannot be based on evidence which cannot possibly be true, is inherently unbelievable, or is opposed to natural laws. In that case the only physical facts involved related to the location of debris, the absence of skid marks and the points of damage to the vehicle. The Eighth Circuit found that these facts alone, left too many variables and were not sufficient to show that the plaintiff's theory was impossible.

The same reasoning is found in *Kansas City Public Service Co.* v. *Shephard* (10th Cir. 1950), 184 F. 2d 945, where the Court refused to apply the rule because of certain variables and reasserted that the doctrine should be applied only where the evidence on which the plaintiff relies is clearly contrary to some immutable law of physics or is hopelessly in conflict with one or more established and uncontroverted physical facts.

Thus, we are not here confronted with a conflict in the decisions of various circuits or the decisions of this Court. All the cases cited by the Petitioner are reconcilable with the Seventh Circuit's decision in this case and do not conflict with the "physical facts" rule generally. The variance in the decisions is simply in respect to the application of the rule under circumstances not analogous to the case at bar. This point is clearly stated by the Seventh Circuit in the opinion below, set forth in the appendix at Pages 25 and 26 of the Petition for Writ of Certiorari, where the Court states:

> "Most Courts which refuse to apply the 'physical facts' rule are faced with many variable factors about which no precise testimony could be given. Often these are automobile-accident cases, in which the expert's reconstruction of the 'physical facts' of

the accident is necessarily based on inaccurate estimates of speed, periods of time, and distances."

The *absence of such variables* in *this* case is significantly noted by the Seventh Circuit:

"In the present case, however, there are no such variables to diminish the persuasiveness of the physical facts. Plaintiffs and defendants performed numerous tests with the same or an identical car hoist and with the same or similar Pontiacs. The only variable which produced different results was the position of the front crossbar. When placed under the front edge of the bumper, the crossbar slid out with minimal pressure. When placed between the tires and the radiator bolt, the crossbar could not be dislodged. *The inescapable conclusion is that Zollman's misuse of the hoist, rather than defective or negligent design of the hoist, caused the accident.*" (Emphasis supplied.)

2. The Decision Below Did Not Decide A Question Of Federal Law And The Determination Of The Question Of Sufficiency Of The Evidence By The Circuit Court Of Appeals Was Not Controlled By State Law.

The Seventh Circuit Court of Appeals did not rest its decision solely upon an Appellate Court decision in Indiana or upon the law of any particular State. Reference was made to the Indiana decision and other State Court decisions simply as an example of universally accepted common law principle.

There is no real issue here as to whether the determination of the questions of sufficiency of certain evidence to raise a question of fact should be controlled by State law where Federal jurisdiction is based on diversity of citizenship. There may be a variation in the State law of

many jurisdictions as to the proper standard to be applied. Some states speak in terms of "scintilla of evidence"; other states talk about "substantial evidence"; some states specifically have ruled that a particular issue is one of law while other states have held that same issue to be one of fact. There are simply no conflicting rules involved here. The "physical facts" rule as applied by the Seventh Circuit is the law of Indiana and is quite universally recognized in the Federal Courts and elsewhere.

In the trial of this case and on appeal before the Seventh Circuit, the petitioners did not argue with the "physical facts" rule or the statement of the rule but only argued as to its application. All the cases cited by the petitioners or respondents before the Seventh Circuit Court of Appeals and cited to this Court do not vary as to the definition of the rule or its affect. This general rule, and the power of the Court is clearly stated in *Kansas Public Service Co.* v. *Shephard* (10th Cir. 1950), 184 F. 2d 945, 947, cited by the petitioner:

> "And where natural laws of physics or uncontroverted physical facts speak with such commanding force that they completely overcome and reduce to sheer absurdity the evidence offered by plaintiff to the contrary, the Court should direct a verdict against plaintiff, or make a finding against him, depending on whether the case is being tried to a jury or to the Court without a jury."

There is nothing unique about the way this rule is stated by the Indiana Courts or by the Courts of any other State or Federal jurisdiction, as suggested by the petitioners. Not once at the trial of this case or before the Seventh Circuit Court of Appeals did petitioner ever

object or argue that the "physical facts" rule did not exist or that there was a difference in the rule among the various jurisdictions or that the rule as stated by the Indiana Courts presented a different standard than that required by the Federal Court system. Petitioners are obviously at this eleventh hour grasping at straws.

This question of sufficiency of evidence and the application of a state versus a federal standard was discussed in *O'Connor* v. *Pennsylvania Railroad Company* (2nd Cir., 1962), 308 F. 2d 911. The Court finds the rules to be substantially similar and then discusses the relationship between "substantial" evidence test of the Federal Courts and the "physical facts" rule. The Court states at pages 914 and 915:

> "As we have already stated, this action was brought in a federal court by reason of the diverse citizenship of the parties; the substantive questions of negligence law are governed by the laws of the state of New York. The question whether the sufficiency of evidence to take the case to the jury is to be controlled by state or federal principles has recently been left open by the Supreme Court. See *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 444-445, 79 S. Ct. 921, 3 L. Ed. 2d. 935 (1959); 2B Barron & Holtzoff, Federal Practice and Procedure §§ 871.1, 1072 (1961). *We need not decide that question because we find that the federal and state standards are substantially similar.* See *Presser Royalty Co.* v. *Chase Manhattan Bank*, 272 F. 2d 838, 840 (2d Cir. 1959). (Emphasis supplied.)
>
> "The propriety of granting or denying a motion for a directed verdict [or for judgment *non obstante veredicto*] is tested both in the trial court and on appeal by the same rule. The trial court must view the evidence and all inferences most favorably to

the party against whom the motion is made. The reviewing court must do the same with respect to a judgment entered on a directed verdict or the denial of a motion for a directed verdict or a judgment entered notwithstanding the verdict. 2B Barron & Holtzoff, Federal Practice and Procedure, § 1075 at 378 (1961). In granting such a motion for a judgment notwithstanding the verdict, and in affirming it on appeal, the function of the jury is not usurped. The jury is simply not being permitted to make unreasonable findings of fact. The case is withdrawn from them 'as a matter of law' because no jury could reasonably bring in a verdict for the opponent of the moving party. To decide upon the propriety of granting this motion, the court looks to the substantial evidence tending to bolster the case of the non-moving party and draws all reasonable inferences therefrom. *But the evidence cannot properly be deemed substantial nor the inferences reasonable if they are contrary to proven physical facts. The inferences which may be drawn must be within the range of reasonable probability, Ford Motor Co.* v. *McDavid,* 259 F. 2d. 261 (4th Cir.) cert. denied. 358 U.S. 908, 79 S. Ct. 234, 3 L. Ed. 2d. 229 (1958) *and must not be at war with undisputed facts.*"

This analysis by the Second Circuit Court of Appeals clearly describes the proper and correct analysis applied by the Seventh Circuit in this case at bar.

3. The Court Of Appeals Has Not Departed From Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

In Part 3 of their argument for granting the Writ, petitioners again attempt to cloud the issue by recitation of facts concerning the dangerous nature of the hoist.

Such facts are in no way material or relevant to the issues before this Court. Respondents do not admit that the evidence showed the hoist was a dangerous or defective instrumentality because of any failure to have a fail safe device or because of any warnings or instructions, or failure to give same. However, such evidence even if true is completely irrelevant and immaterial here just as it was at the trial and before the Seventh Circuit Court of Appeals. This hoist in question could have been the most dangerous and defective hoist ever manufactured, but the respondents, would still not be liable *unless such dangerous or defective condition proximately caused the injuries to the petitioners. There was no evidence of any such casual relationship; to the contrary, the evidence conclusively showed that the cause of the injuries was the misuse of the hoist.* Again, as previously stated, the issue clearly boils down to whether the plaintiff raised the automobile with the front crossbar of the hoist against the front tires of the automobile or whether the plaintiff raised the automobile with the front crossbar of the hoist under the very front edge of the bumper of the automobile which would clearly and admittedly be *misuse* of the product and an absolute defense.

This is clearly a case "where natural laws of physics or uncontroverted physical facts speak with such commanding force that they are completely overcome and reduce to sheer absurdity the evidence offered by the plaintiff to the contrary".

The Seventh Circuit, after careful review of all of the evidence, could find no *credible* evidence to support the verdict. They further found that the uncontradicted

credible evidence and "physical facts" clearly demonstrated that the accident was caused by a "misuse" of the product. They were therefore quite properly constrained to direct the lower court to do what he should have done in the first place, enter a judgment for the defendant.

Respectfully submitted,

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CERTIORARI DENIED N.C.R.